

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

74-2634

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

April Term 1975

Docket 74-2634

- - - - - x

JOSE GIL OJEDA-VINALES,

Appellant,

-against-

THE IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

- - - - - x

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

RELEVANT PART OF THE RECORD

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William H. Oltarsh
Attorney for Appellant
225 Broadway
New York, N.Y. 10007

b

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UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

No.

ORDER TO SHOW CAUSE, NOTICE OF HEARING, AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA:

In the Matter of **OJEDA-VINALES, Jose Gil**

File No. **A20 595 024**

Respondent.

Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Paraguay and a citizen of Paraguay
3. You entered the United States at Miami, Florida on or about October 24, 1972
4. At that time you were admitted as a nonimmigrant visitor for pleasure.
5. You have been authorized to remain in the United States until Dec. 31, 1972
6. You remained in the United States thereafter without authority.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act, in that, after admission as a nonimmigrant under Sec. 101(a) (15) of said act you have remained in the United States for a longer time than permitted.

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at 20 W. Broadway, New York, N.Y., 14th floor

on December 21, 1973 (M) at 9:00 a.m., and show cause why you should not be deported from the United States on the charge(s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated: December 20, 1973

R. January 3, 1974 at 8:45 am
MASH

Maurice F. Dely
DEPUTY DISTRICT DIRECTOR
NEW YORK DISTRICT
(City and State)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration & Naturalization Service
20 West Broadway
New York, N. Y.

In the Matter of

JOSE GIL OJEDA-VINALES,

Respondent

) File No. A20 595 024
)
)

STATE OF NEW YORK)

) SS.:

COUNTY OF NEW YORK)

PLEASE TAKE NOTICE that the undersigned, JOSE GIL OJEDA-VINALES, will move that the Immigration Service arrested, searched and seized the respondent without a warrant and/or without reasonable or probable cause. The Service will be called upon to assume the burden of justifying the basis and facts upon which it took respondent into custody. The respondent serves notice herewith that he wishes to give sworn testimony at the hearing upon his personal knowledge of the facts which show the illegal arrest search and seizure.

The respondent herewith also demands that the arresting officers be subpoenaed and produced at the hearing because the respondent wishes to question them because their testimony is relevant and material to the issue of the unreasonable arrest search and seizure which was made without probably cause. This is a motion to suppress the evidence illegally obtained.

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Under Freedom of Information Act Section 552(b)7
and such other portions of the Act as may be applicable herein;
all notes and memoranda relating to this case and which formed
any basis for the detention and seizing of the respondent are
demanded to be produced or the attorney for the respondent
be permitted to inspect the same. Also demanded are the
names and addresses of any alleged informants relating to the
said detention and seizure of the respondent.

JOSE GIL OJEDA-VINALES

Sworn to before me this
day of January, 1974.

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UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

MATTER OF

FILE A-20 595 024

QJEDA-VINALES, JOSE GIL

IN DEPORTATION

PROCEEDINGS

TRANSCRIPT OF HEARING

Before: HOWARD I. OGREN, Immigration Judge

Date: January 11, 1974 Place: 20 West Broadway, NYC

Transcribed by Terry Lee Jones Recorded by Dictabelt

Official Interpreter ANA ROSNER (U.S.I.N.S.)

Language SPANISH

APPEARANCES:

For the Service:

WILLIAM B. GUROCK, Esq.
Trial Attorney

Station _____

For the Respondent:

DAVID OLTARSH, Esq., of Counsel

OLTARSH, FLATTERY &

OLTARSH

225 Broadway, NYC

JANUARY 11th, 1974

1 IMMIGRATION JUDGE(speaking to respondent through official interpreter)

2 Q. Your name is JOSE GIL OJEDA-VINALES?

3 A. (respondent) Yes.

4 Q. Do you understand the Spanish interpreter?

5 A. Yes.

6 IMMIGRATION JUDGE: All my questions will be asked through the interpreter
7 who will translate my questions into Spanish, and your answers from
8 Spanish into English. So wait until the interpreter translates all
9 my questions into Spanish, do you understand?

10 A. Yes sir.

11 Q. If there is something in this hearing you do not understand, tell
12 me and I will explain. Is that clear? ^{you}

13 A. Yes sir.

14 Q. And the hearing is to determine whether you are legally in the
15 United States or illegally in the United States and if you are illegally
16 in this country, the question is whether there is any relief available
17 to you so that you do not have to be deported. Do you understand that
18 the purpose of the hearing.

19 A. Yes.

20 Q. You wish the gentleman seated at the head of the table Mr. Oltarsh
21 to represent you as your lawyer?

22 A. Yes.

23 IMMIGRATION JUDGE: All right stand up sir and raise your right hand.
24 Do you solemnly swear that your testimony you give in this hearing will
25 be the truth the whole truth, nothing but the truth so help you God.

26 A. Yes sir.

1 Q. Will you state your name for the record, please?

2 A. Jose Gil Ojeda-Vinales.

3 IMMIGRATION JUDGE: Counsel do you concede service to the order to show
4 cause and agree that it be marked as an exhibit?

5 A. Mr. Oltarsh: Yes sir.

6 IMMIGRATION JUDGE: So received as exhibit one.

7 Do you waive reading of the allegations counsel?

8 MR. OLTARSH: Yes I do.

9 Q. Do you concede truth of the allegations?

10 MR. OLTARSH: Yes, except if the deportability.

11 Q. You concede truth of the allegations but you don't concede deportability.

13 A. Yes sir.

14 MR. GUROCK: May I question the respondent. May I.

15 IMMIGRATION JUDGE: Yes.

16 MR. GUROCK: Mr. Ojeda is it true you are a citizen of Paraguay?

17 A. Yes.

18 Q. It is true you are not a citizen or national of the United States?

19 A. That's true.

20 MR. GUROCK: No further questions.

21 MR. OLTARSH: May I inquire.

22 IMMIGRATION JUDGE: Counsel, you have already conceded and your client admits that he is in the country illegally. At this point are you going to make an application. I would have to find, based on the record so far, that he's deportable based on your own admission counsel and the testimony of your client.

TRANSCRIPT OF HEARING

1 MR. OLTARSH: Well the motion papers made. . . .

2 IMMIGRATION JUDGE: Well there are no motion papers offered to the
3 court.

4 MR. OLTARSH: Well I am sorry. All right if I haven't come to that.
5 May I give you one brief announcement.

6 IMMIGRATION JUDGE: You want to withdraw one of your. . . .

7 MR. GUROCK: I'm sorry I have questioned this man. He has testified
8 - - - counsel that he is a citizen of Paraguay and is not a citizen
9 of the United States.

10 MR. OLTARSH: Correct.

11 MR. GUROCK: I call you to your attention sir, that the law requires
12 that once alienage is established that the burden is on him to
13 establish his methods and right to remain in the United States.

14 IMMIGRATION JUDGE: Mr. Oltarsh you understand that Section 291 of the
15 Immigration and Naturalization Act so requires it.

16 MR. OLTARSH: - - - at that point I wish to suppress or move to suppress
17 the information which has been admitted on the grounds that it was not
18 obtained - - - legally. I cannot deny that the man is from Paraguay
19 and he is a citizen of Paraguay.

20 IMMIGRATION JUDGE: Well then counsel at this point I would have to
21 agree with the government and I would assume by questioning the
22 respondent you are going to illicit information to warrant that he's
23 justifiably in the United States and legally here. ~~TRUE~~ That's
24 the only ground that I would permit you to question the respondent.

25 MR. OLTARSH: All right.

26 IMMIGRATION JUDGE: Proceed.

1 MR. OLTARSH: Yes. All right at this point in light of your statement
2 I would like to offer in evidence the original of a notice dated January
3 3, 1974 regarding the nature of the respondent's claim in this proceeding,
4 a copy of which was duly served upon the government.

5 MR. GUROCK: The original was not.

6 MR. OLTARSH: I said a copy of which was duly served.

7 MR. GUROCK: - - - .

8 MR. OLTARSH: - - - I have a registered mail receipt here sir, that on
9 January 4, 1974. . .

10 IMMIGRATION JUDGE: Let the record show that I have before me a notice
11 of motion that the Immigration Service arrested, searched and seized
12 the respondent without warrant or due cause. Now, I have before me this
13 notice of motion, and what you intend to establish, but counsel by your
14 own admission and your client's admission he is a native of Paraguay
15 and he is not a citizen of the United States. What right does he have
16 to be in the United States today, do you have that documentation or
17 do you wish to illicit it from your client.

18 MR. OLTARSH: The respondent's claim is not the merits of his particular
19 stay in the United States because of any permission by the government.
20 It is a claim that the information he has no right to remain in the
21 United States was obtained through improper and illegal means, and
22 therefore the entire acquisition of that information is sought to be
23 suppressed by reason of the grounds upon which it was obtained.
24 That is the claim of the respondent.

25 IMMIGRATION JUDGE: Counsel, let's go off the record for a moment.
26 Let the record show that an off the record discussion was had by and

1 between both counsel and the bench concerning the burden of proof
2 required under section 291 of the Immigration and Nationality act
3 (8 USC 1361). Counsel to the respondent was specifically told that in
4 deportation proceedings the burden of proof is on the person to show
5 time, place, and ~~manner~~ manner of entry to the United States and that
6 it is presumed that if this proof is not sustained that person is in
7 violation of law and in the United States illegally. Now in view of
8 the motion presented by counsel I will give him briefly an opportunity
9 to show something which I do not believe is warranted. As I explained
10 counsel the only purpose of your questioning is to show that ~~maximly~~
11 your client is legally in the United States. I will permit you to
12 proceed solely for purposes of appeal, because based upon what
13 your client has stated and based on the fact you do not intend, to
14 establish that he is legally here, is that correct counsel?

15 MR. OLTARSH: Not by any documentary evidence sir.

16 IMMIGRATION JUDGE: Or by testimony?

17 MR. OLTARSH: No, that's correct.

18 IMMIGRATION JUDGE: Then I would have to assume that this man is deportable.
19 But I will permit you to proceed very briefly on the issue of what you
20 claim to be an illegal arrest and search.

21 R. OLTARSH: Mr. Ojeda do you recall the date when you were taken
22 into custody by any officials or officers of the Immigration Service of
23 the United States?

24 1. (respondent) On December 20.
25 2. About what time of day?
26 3. 9 a.m.

1 Q. What were you doing immediately prior to this detention or arrest?

2 A. I was at work.

3 Q. Where was that?

4 A. 471 West 16th Street.

5 Q. Can you tell us what happened at the time when anybody from the
6 Immigration Service came into these premises?

7 A. Well he was there and told the boss he wanted to see me.

8 Q. And what happened after that?

9 A. Naturally he told me to accompany him.

10 Q. How many were there from the Immigration Service?

11 A. Two.

12 Q. Are these the two gentlemen seated behind you?

13 IMMIGRATION JUDGE: Let the record show that there are two gentlemen
14 seated in the court room. Will they please identify themselves?

15 WITNESSES: My name is Louis Gallopo Criminal investigator for area

16 32. My name is R. James Adams, criminal investigator for area 12.

17 IMMIGRATION JUDGE: Did you say that either one of the gentlemen came
18 into your place of employment to question you?

19 A. Mr. Adams. Just Mr. Adams.

20 IMMIGRATION JUDGE: And another man who is not here?

21 A. That's correct, another young man.

22 MR. CLTARSH: Did either of the gentlemen inform you that they had an
23 warrant for your arrest or your detention?

24 A. No.

25 Q. Did they tell you the reason why they had come to this place of
26 employment to get you or to detain you?

1 A. No, they just told me to accompany them.

2 Q. And did you accompany them?

3 A. Yes.

4 Q. Where did they take you?

5 A. They brought me here.

6 Q. Did they take any documents or any papers or records from you
7 either prior to taking you down here, or at the time they were bringing
8 you down here?

9 A. No, they didn't take anything from me.

10 MR. OLTARSH: I have no further questioning of this witness.

11 IMMIGRATION JUDGE: Mr. Gurock.

12 MR. GUROCK: The government rests, counsel has established nothing what
13 so ever.

14 MR. OLTARSH: May I now have permission to interrogate Mr. Adams?

15 MR. GUROCK: The government objects to that, no basis for it.

16 IMMIGRATION JUDGE: Let the record show that an off the record discussion
17 was had by and between both counsel and the bench concerning calling
18 Mr. Adams as a witness. I indicated that I wished to ask Mr. Adams two
19 or three questions. However, Mr. Gurock has decided to question the
20 respondent before Mr. Adams is called.

21 MR. GUROCK: Mr. Ojeda isn't it true Mr. Adams identified himself to you
22 as an Immigration Officer?

23 A. (respondent) Yes.

24 Q. And didn't they ask you what country were you a citizen?

25 A. He didn't ask me where I came from. A young man here.

26 Q. The other man that was with him asked you isn't that right?

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1 MR. OLTARSH: Here in the building, he said.

2 A. A young man asked a question here.

3 Q. And what did you tell him?

4 A. I told him everything he asked me.

5 Q. And didn't they tell you before you were questioned you had a right
6 to an attorney? A right to remain silent.

7 A. Yes he made me read the paper.

8 Q. And that's in Spanish?

9 A. Yes.

10 Q. And you read and understand Spanish is that right?

11 A. Yes - - -.

12 Q. And you voluntarily without any force at anytime being placed upon
13 you answered all the questions they put to you, is that correct?

14 A. That's right.

15 MR. GUROCK: I have no further questions.

16 MR. OLTARSH: I have a couple of more questions if I may.

17 IMMIGRATION JUDGE: Proceed.

18 MR. OLTARSH: Mr. Ojeda is that the first time that the Immigration
19 Officers informed you of your rights that you just testified to when
20 you arrived here in this building?

21 A. Yes.

22 MR. GUROCK: One question. Didn't the officers when they showed you
23 their identification tell you that you had the right to remain silent
24 and your rights to an lawyer?

25 A. Mr. Adams just told me to accompany him.

26 MR. GUROCK: He told me you this in Spanish?

1 A. No he told that to the boss.

2 Q. And the boss told you to go with him?

3 A. The boss told me.

4 Q. To go with him?

5 A. Yes.

6 Q. And you went?

7 A. Yes.

8 MR. GUROCK: Okay.

9 IMMIGRATION JUDGE: You want to change places with Mr. Adams, please.

10 Mr. Adams raise your right hand please. Do you solemnly swear the testi-
11 mony you will give, will be the truth, the whole truth, and nothing but
12 the truth so help you God?

13 A. I do. (Mr. Adams)

14 IMMIGRATION JUDGE: All right be seated please. State your name and
15 occupation for the record please.

16 A. (Mr. Adams) Richard James Adams, criminal investigator for the United
17 States Justice Department, Immigration Service.

18 IMMIGRATION JUDGE: Do you recognize the respondent?

19 A. (Mr. Adams) Yes I do.

20 IMMIGRATION JUDGE: Could you tell this court what led you up to
21 the place of employment on that date?

22 A. I was given a G-123 from which is a complaint form by my immediate
23 supervisor Mr. Gallopo, which indicated there was an illegal alien working
24 at the ~~unknown~~ address given.

25 IMMIGRATION JUDGE: And was the name of the alien given to you?

26 A. The first name was given and the last name was marked as unknown on

1 the complaint.

2 IMMIGRATION JUDGE: Well how did you come to the respondent, at the place
3 of employment?

4 A. I asked the boss or whoever the person's in charge if he had a Jose
5 working there as a mechanic, which the complaint indicated worked there.

6 Q. And the employer led you to the respondent?

7 A. The employer brought the respondent to me in the office.

8 IMMIGRATION JUDGE: Mr. Oltarah.

9 B. OLTARSH: Mr. Adam is it a fair statement that prior to leaving the
10 office of the Immigration Service you then did not know the identity or
11 the last name of this respondent is, that correct?

12 A. That's correct.

13 B. You have no way to check as to his actual status before you actually
14 went to the premises and detained him is that correct?

15 A. That's correct.

16 B. May I ask whether that form you referred to recites the actual
17 name of the complainer or the informer stating there was an illegal
18 alien working in this mechanic garage?

19 A. Yes, it has a place for the complainer's name.

20 B. And do you recall whether there was a complainer's name on that
21 form, that you referred to?

22 A. I believe it was phoned in anonymously.

23 B. Phoned Anonymously.

24 A. Right.

25 B. Does the government go out on every anonymous tip, or anonymous infor-
26 mation it receives with regards to aliens?

1 A. Quite frequently we do.

2 Q. Is there any method of screening out or determining what the govern-

3 ment believes is bonafide - . . . ?

4 MR. GUROCK: - - - I'll object - - -.

5 IMMIGRATION JUDGE: Sustained.

6 MR. OLTARSH: In summary however, it is your testimony is it not that you
7 just based on an anonymous tip that a gentleman or man named Jose was
8 working at this particular garage, the government directed you to go
9 to this place & to investigate or do what you are suppose to do, is
10 that right?

11 A. Basically correct.

12 Q. I see. Now when you got to this garage did you. As I understand it
13 you inquired of this man, that he was named Jose and eventually placed
14 him in custody, is that right?

15 A. Well your client's testimony was a little bit inaccurate.

16 IMMIGRATION JUDGE: Will you explain then, what happened?

17 WITNESS: (Mr. Adams) I entered the garage alone, my partner was with
18 the ~~same~~ car, not with me. There ~~was~~ were several people in the owner's
19 office. I asked to speak to the owner alone and he ~~minimum~~ said no,
20 talk to him ~~in~~ front of everybody there and I said fine. I asked if
21 he had a Jose that worked there, he said yes he did. I said could
22 I talk to him, he said sure, I'll bring him into the office. He
23 brought him into the office, I asked ~~in~~ if he was Jose. He said he
24 was Jose. I asked after showing who I was and the boss told him who
25 I was, I told him in English and Spanish, and the boss told him in
26 Spanish. Apparently he's fluent in Spanish. He said that he was Jose

1 and that he was a tourist here and that he was Paraguayan. At which time
2 I told the boss he would have to accompany me to the office.

3 IMMIGRATION JUDGE: Did he volunteer this information, without you ques-
4 tioning him?

5 A. (Mr. Adams) I asked him if he was a tourist and he said yes, and
6 he stated he was from Paraguay.

7 MR. OLTARSH: Prior to asking him those questions did you identify yourself
8 that you were from Immigration?

9 A. Yes.

10 Q. Prior to asking him these questions did you inform him of any rights
11 to have an attorney or to be warned of any kind of rights.

12 A. Before I asked him if he was Jose, no.

13 Q. That's right.

14 A. No.

15 Q. Prior to asking him if he was a visitor or if he was from Paraguay
16 or any other country, did you tell him his rights?

17 IMMIGRATION JUDGE: One moment, could you answer that question, yes
18 or no?

19 A. (Mr. Adams) No.

20 Q. Did you have a warrant at the time you went to this garage in search
21 of Jose?

22 A. No.

23 MR. OLTARSH I have no further questions.

24 IMMIGRATION JUDGE: Any further questions Mr. Gurock.

25 MR. GUROCK: Yes, Mr. Adams isn't it your practice to advise people before
26 you question them as to their, well first of all you just asked him

1 what country he was from, is that right?

2 A. (Mr. Adams) - - -.

3 MR. GUROCK: Isn't it your practice to notify these people they have the
4 right to remain silent if you are going to question them?

5 MR. OLTARSH: I object to that question, on the grounds what he usually
6 does isn't relevant here. (withdrawn)

7 MR. GUROCK: Did you, do you remember whether you gave him the Miranda
8 warning or not?

9 MR. OLTARSH: I object to that. The witness has already testified.

10 IMMIGRATION JUDGE: Mr. Gurock I believe the testimony is on record that
11 the first time the respondent was advised of his rights, was the time
12 he was questioned here, at 20 West Broadway. I believe the testimony
13 by both the alien and the witness was that he was not advised of his
14 rights in the place of employment. Anything further Mr. Oltarsh.

15 A. No sir.

16 IMMIGRATION JUDGE: Mr. Gurock.

17 MR. GUROCK: (to witness) You merely asked him was he a visitor and you
18 merely asked him what country was he a citizen of, whether he was from
19 Paraguay, is that right?

20 A. No he volunteered the information he was from Paraguay. I didn't
21 feel I had reasonable grounds in prior to ask if he was a ~~immigrant~~ tourist
22 or believe he was an alien. I just had a man there that fit the complaint.

23 MR. GUROCK: Did you ask him if he was a tourist is that right?

24 A. I asked him if he was a tourist.

25 MR. GUROCK: And he volunteered he was from Paraguay. MM

26 A. At which point I dropped the questioning.

TRANSCRIPT OF HEARING

1 MR. GURCK: And you brought him into this office.

2 A. Brought him in and advised him of his rights.

3 MR. GURCK: Thank you.

4 IMMIGRATION JUDGE: Thank you Mr. Adams. Is there anything further Mr.
5 Oltarsh.

6 MR. OLTARSH: No your honor.

7 IMMIGRATION JUDGE: Anything further Mr. Gurck.

8 MR. GURCK: No sir.

9 IMMIGRATION JUDGE: All right.

10 MR. OLTARSH: Yes, wait a second when you say I have nothing further I do
11 have some other questions, bearing on the ultimate conclusion here regard-
12 less of your honor's decision. May I ask the respondent some questions.

13 IMMIGRATION JUDGE: I'm going to tell you right now. . .

14 MR. OLTARSH: Yes sir.

15 IMMIGRATION JUDGE: That the motion that you made is denied and it will
16 be mentioned in the decision that is forthcoming.

17 MR. OLTARSH: Yes sir.

18 IMMIGRATION JUDGE: At this point, I also stated to you that I would
19 find your client deportable as charged and in lieu of deportation he has
20 the right to apply for the privilege of voluntary departure.

21 MR. OLTARSH: Yes sir.

22 IMMIGRATION JUDGE: Now before we get to that point do you wish to design-
23 ate any country of deportation, if necessary.

24 MR. OLTARSH: I imagine his native country your honor, but I suggest
25 we ask the respondent.

26 MR. OLTARSH(speaking to respondent) Mr. Ojeda if the government were to

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1 deport you, what country would you select to be deported to?
2 . . . (respondent) Paraguay.
3 IMMIGRATION JUDGE: All right.
4 MR. OLTARSH: May I continue with some other questions along that line?
5 IMMIGRATION JUDGE: What is your application?
6 MR. OLTARSH: For voluntary departure in the event. . .
7 IMMIGRATION JUDGE: Do you wish to qualify your client?
8 MR. OLTARSH: Yes.
9 IMMIGRATION JUDGE: Proceed.
10 MR. OLTARSH: Mr. Ojeda, if the government in lieu of deportation
11 would grant you the right to voluntary leave the country at your own
12 expense do you have sufficient funds to purchase the necessary
13 airline ticket to return to Paraguay?
14 . . . Yes.
15 . . . And if the government would grant you the right to depart voluntarily
16 within a certain period of time would you honor and obey this voluntary
17 right?
18 . . . Yes I would.
19 MR. OLTARSH: I have no further questions, your honor.
20 IMMIGRATION JUDGE: How old are you?
21 . . . 27.
22 . . . Are you married?
23 . . . Yes.
24 IMMIGRATION JUDGE: Mr. Gurock.
25 MR. GUROCK: Mr. Ojeda when do you get paid in your place of employment?
26 MR. OLTARSH: What day of the month, the week. . .

- 15 -

TRANSCRIPT OF HEARING

United States Department of Justice Immigration and Naturalization Service

1 A. On Friday.

2 Q. MR. Gurock: You were apprehended on a Thursday, is that right?

3 A. Yes on a Thursday.

4 Q. Did you have any money on you, in your possession?

5 A. Yes I had some money because I wanted to deposit it in the bank.

6 Q. How much did you have?

7 A. I had \$1500.

8 Q. You had \$1500 on your person?

9 A. Yes because I was going to deposit it.

10 Q. Where did you get \$1500.

11 A. I had it in my pocket.

12 Q. How come you had \$1500 in your pocket, you had \$1500 in cash in your pocket?

13 A. I had it at home and I took it with me.

14 Q. To put it in the bank?

15 A. Yes.

16 Q. Why did you decide that day to put it in the bank?

17 A. Because on that day a friend of mine was going to introduce me to the bank, for to deposit the money.

18 Q. How long have you been working in the United States?

19 A. Perhaps over one year.

20 Q. How soon after you arrived in the United States did you go to work?

21 A. After 15 or 20 days about.

22 Q. Did you come here to go to work?

23 A. Well a friend of mine invited me to come here and when I came here he told me that here was very nice.

1 Q. You left your wife and you have a child is that right?
2 A. Yes.
3 Q. And you left them where, in what country?
4 A. They are in Argentina.
5 Q. You are sending them money?
6 A. Yes I am sending them money?
7 Q. And have you been paying taxes?
8 A. Yes I pay taxes.
9 Q. You have your own apartment?
10 A. Yes I do.
11 Q. Do you have an automobile?
12 A. Yes I have a car.
13 Q. And you own the furniture in the apartment in which which you live?
14 A. Yes, but whatever I have belong to me.
15 Q. And how much do you earn a week approximately?
16 A. \$170 to \$175.
17 Q. And how much money money do you send to your wife?
18 A. \$100 a month.
19 Q. Tell me how did you collect \$1500 in this period of time?
20 A. In one year.
21 Q. You bought a car too? Didn't you.
22 A. The car is a very old car, they gave it to me at the place of work.
23 Q. How much rent do you pay?
24 A. \$150.
25 Q. A month?
26 A. Yes but we are two, we share, we are two together.

- 1 Q. Have you ever engaged in any other activities other than being a
2 mechanic here?
3 A. No, nothing else.

4 IMMIGRATION JUDGE: What kind of mechanic are you?

5 A. I am sir a complete mechanic because of my - - -.

6 IMMIGRATION JUDGE: - - -What do you do here? What kind of mechanical ~~work~~
7 work you do in this country?

8 A. We make ~~repairs~~repairs - - -.

9 IMMIGRATION JUDGE:- - -Of what?

10 A. Of all kinds of vehicles, all cars foreign.

11 IMMIGRATION JUDGE: Are you an auto mechanic?

12 A. Yes.

13 MR. GUROCK: Did you ever apply for a labor certification?

14 A. What's that.

15 Q. Did you ~~think~~ fill out forms and you asked your boss to sign forms,
16 to get a labor clearance so that you can stay in the United States?
17 Or get a visa.

18 A. Yes I asked my boss.

19 Q. And your present attorney filled out the forms for you? The present
20 attorney filled out the forms for you?

21 A. Yes.

22 Q. Has it been approved yet?

23 A. No I don't know that.

24 Q. You don't know that. Did you ever make out forms for the American
25 counsel in Argentina for a visa?

26 A. Not in Argentina.

Q. In Paraguay?

24. Paraguay.

3 MR. GUROCK: In Paraguay yes. I have no other questions.

4 IMMIGRATION JUDGE: Is there any opposition to voluntary departure?

5 MR. GUROCK: 30 days the government has no objection.

6 IMMIGRATION JUDGE: Is there anything else further you would like to say?

MR. OLTARSH: NO, that's all your honor.

IMMIGRATION JUDGE: In view of what transpired here, I'm going to enter an oral decision at this point.

10 NOTE: At this point in the proceedings the Immigration Judge delivered
11 an oral statement of his decision in this matter. This has been transcribed
12 separately and is attached hereto. * * * * *

13 IMMIGRATION JUDGE(to respondent): Do you understand the order that I
14 entered?

15 4. I understand.

16 Q. Do you accept this as a final decision, Mr. Oltarach?

17 MR. OLTARSH: Well when you say do I accept it, its your honor's decision.
18 Yes I accept it for what it is.

19 IMMIGRATION JUDGE: All right, do you wish to appeal it?

MR. OLTARSH: Yes.

21 IMMIGRATION JUDGE: Then you don't accept it as a final decision--?

22 MR. OLATARSH: Well that's what I'm saying.

3 IMMIGRATION JUDGE: I serve you now with three copies of the form I-290
4 which must be submitted within ten days, which means you have until
5 the 21st (Monday the January 21) to submit this to obtain the right
6 to appeal. Do you accept this as final Mr. Gureek.

TRANSCRIPT OF HEARING

1 MR. GUROLA: Yes.

2 IMMIGRATION JUDGE: Is there anything further Mr. Oltarsh?

3 A. (Mr. Oltarsh) No your honor.

4 IMMIGRATION JUDGE: All right the hearing is closed.

5

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10 I hereby certify that to the best of my knowledge and
11 belief the foregoing pages numbered 1 through 20
12 are a complete and accurate transcript of the above -
described proceedings.

Jerry Lee Jones
Signature
Transcriber
Title

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UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A20 595 024 - New York

JAN 11 1974

In the Matter of:)
GUERRA-VINALES, JOSE GIL) In Deportation Proceedings
Respondent -)

CHARGE: I & N Act - Section 241(a)(2) (8 USC 1251(a)(2))-
Remained longer - visitor.

APPLICATION: Suppression of evidence gathered, as a result of
illegal search and seizure - in alternative of
voluntary departure.

In Behalf of Respondent:

David Gitarash, Esq. of Counsel
Gitarash, Flattley & Gitarash
225 Broadway
New York, N.Y. 10007

In Behalf of Service:

William B. Gureck, Esq.
Trial Attorney
New York, N.Y. 10007

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 37 year old married male alien, a native and citizen of Paraguay who last entered the United States on or about October 24 1972 as a non immigrant visitor for pleasure. He was authorized to remain in the United States until December 31 1972, but remained in the United States thereafter without authority. The respondent conceded all these allegations. However, his attorney stated that he is not deportable from the

United States in view of the fact that the evidence gathered by the Immigration and Naturalization Service was obtained as the result of an illegal search and seizure. Counsel was told on the record that by virtue of the fact that the respondent admitted that he was a native and citizen of Paraguay, and not a citizen of the United States, the burden of proof to establish the time, place and manner of entry to the United States was upon the respondent. (Section 291 of the Immigration and Nationality act, 8 USC 1361), and if that burden is not sustained the respondent shall be presumed to be in the United States ' violation of law. The respondent was given adequate opportunity to explain his status in the United States, including the time, place, and manner of entry, but failed to do so. Accordingly, the deportation charge is sustained by virtue of the admissions made by him.

In order to protect the right of the respondent, he was permitted to testify concerning the circumstances surrounding the arrest by Immigration Officers. The respondent testified that on December 20, 1973, at approximately 9 a.m., two men who identified themselves as Immigration Officers questioned him at his place of employment concerning whether he was a tourist or not. He identified one of the Immigration Officers as being a gentleman named Adams, who also testified in this proceeding substantially in accord with the respondent. He was given information by an anonymous source, that a person by the name of Jose was working at the same place of employment as the respondent and was illegally in the United States. Mr. Adams went to the respon-

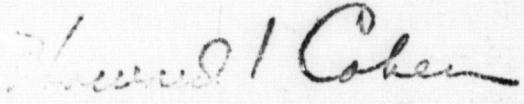
dent's place of employment, he spoke to the respondent's employer, and asked him if there was such a person by the name of Jose working there? The respondent was then brought into the employer's office and he was questioned as to whether he was a tourist. He admitted that and volunteered that he was from Paraguay, and at that point the Immigration and Naturalization Service's Investigator brought the respondent to the Service office at 20 West Broadway, N.Y.C.

The arrest was certainly a lawful one. Section 237 of the Immigration and Nationality Act (8 USC 1337) authorizes the arrest of any alien in the United States, if the Immigration and Naturalization Service has reason to believe that the alien so arrested is in the United States in violation of any law. The investigator being given information, even by an anonymous source, that there was such an alien in the United States illegally, properly went to the respondent's place of employment, properly questioned him and properly brought him to the Immigration and Naturalization Service office where he was then questioned after being advised of his rights.

COURT: IT IS ORDERED that the respondent's motion to suppress evidence gathered as a result of an alleged illegal arrest and search^{by} and the same hereby is denied.

IT IS FURTHER ORDERED that in lieu of an order of deportation, that the respondent be granted voluntary departure without expense to the government on or before 30 days from the date this order becomes final or any extension beyond such date that may be granted by the District Director, and under such conditions that the District Director shall direct.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings, and the following order shall there upon become immediately effective. The respondent shall be deported from the United States to Paraguay on the charge contained in the order to show cause.


EDWARD I. COHEN
Immigration Judge



United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

File: A20 593 024 - New York

NOV 21 1974

In re: JOSÉ GIL OJEDA-VINALES

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: David Oltarsh, Esquire
Oltarsh, Flattery & Oltarsh
225 Broadway
New York, New York 10007

CHARGES:

Order: Sec. 241(a)(2), IEN Act (8 U.S.C. 1251
(a)(2)) - Nonimmigrant visitor
for pleasure - remained longer

APPLICATION: Termination of deportation proceedings

This is an appeal from a decision of an immigration judge dated January 11, 1974, which found the respondent deportable on the above-stated charge, but afforded him the privilege of voluntary departure. The appeal will be dismissed.

The respondent is a married male alien, a native and citizen of Paraguay. He last entered the United States on or about October 24, 1972 as a nonimmigrant visitor for pleasure authorized to remain in that status until December 31, 1972. He failed to depart and has remained in the United States longer than authorized. The respondent admitted the truth of the factual allegations in the Order to Show Cause, but refused to concede deportability.

Counsel on appeal alleges (1) that there was an illegal arrest and that consequently all the facts acquired by virtue of the illegal arrest should be suppressed; (2) that when respondent was first questioned by immigration officers, the Service failed to give a warning of the type used in Miranda v. Arizona, 384 U.S. 436 (1966); and (3) failure to give an adequate warning pursuant to the Miranda rule was a denial of the respondent's rights under the Fifth Amendment.

We reject counsel's first contention that there was an illegal arrest and that all the facts acquired thereby should be suppressed. Upon review of the respondent's testimony explaining what took place on December 20, 1973, we find that even if the facts in the offer of proof were true, an illegal arrest would not be established. The immigration officers questioned the respondent pursuant to the statutory authority expressly given to officers of the Service under section 287(a)(1) of the Immigration and Nationality Act to interrogate without warrant any person believed to be an alien as to his right to be or to remain in the United States. This statutory authority has been repeatedly upheld by the courts, Cheung Tin Wong v. INS, 463 F.2d 1123 (D.C. Cir. 1972); Au Yi Lau and Tit Tit Wong v. INS, 445 F.2d 217 (D.C. Cir. 1971), cert. denied 404 U.S. 864 (1971); Yam Sang Kwai v. INS, 411 F.2d 683 (D.C. Cir. 1969), cert. denied 396 U.S. 877 (1970).

The record in this case does not disclose any evidence used against the respondent to establish his deportability which was obtained as a result of any search or his arrest. Instead the respondent argues, in effect, that his physical presence is the evidence to be suppressed as that presence was obtained illegally.

Although its vitality has been recently questioned ^{1/}, the general principle that the illegality of an arrest does not destroy a later valid proceeding has long been recognized by the Supreme Court and is still a valid rule of law, Frisbie v. Collins, 342 U.S. 519 (1952); Kay v. Illinois, 119 U.S. 436 (1886). This principle has been repeatedly upheld by the courts, Guzman-Flores v. INS and Castellanos-Castillo v. INS, 496 F.2d 1245 (7 Cir. 1974); Taylor v. Alabama, 465 F.2d 376 (5 Cir. 1972); United States v. Woodring, 446 F.2d 733 (10 Cir. 1971); United States v. Morris, 445 F.2d 1233 (8 Cir. 1971); Autry v. Wiley, 440 F.2d 799 (1 Cir. 1971); High Pine v. Montana, 439 F.2d 1093 (9 Cir. 1971); La Franca v. INS, 413 F.2d 686 (2 Cir. 1969).

There is no merit to counsel's second contention that immigration officers must administer warnings as set forth in Miranda v. Arizona, supra, prior to any questioning. Miranda warnings need not be given where the alien is not in a custodial setting. Interrogation has been characterized neither as illegal nor as an arrest, Matter of Seavo, Interim Decision 2193 (BIA 1973); Cheung Tin Wong v. INS, supra; Au Yi Lau and Tit Tit Wong v. INS, supra; and Yam Sang Kwai v. INS, supra. Here the alien was not under arrest, so as to require a Miranda warning, when he was interrogated at his place of employment or when he accompanied the investigators to the office of the Service. He was merely under temporary detention for questioning, which does not require such a warning.

In this case, the respondent was not compelled to testify against himself in violation of the Fifth Amendment; he did not claim the privilege. The respondent clearly admitted at the deportation proceedings the

^{1/} United States v. Toscanino, 500 F.2d 267 (2 Cir. 1974), a case presenting radically different facts.

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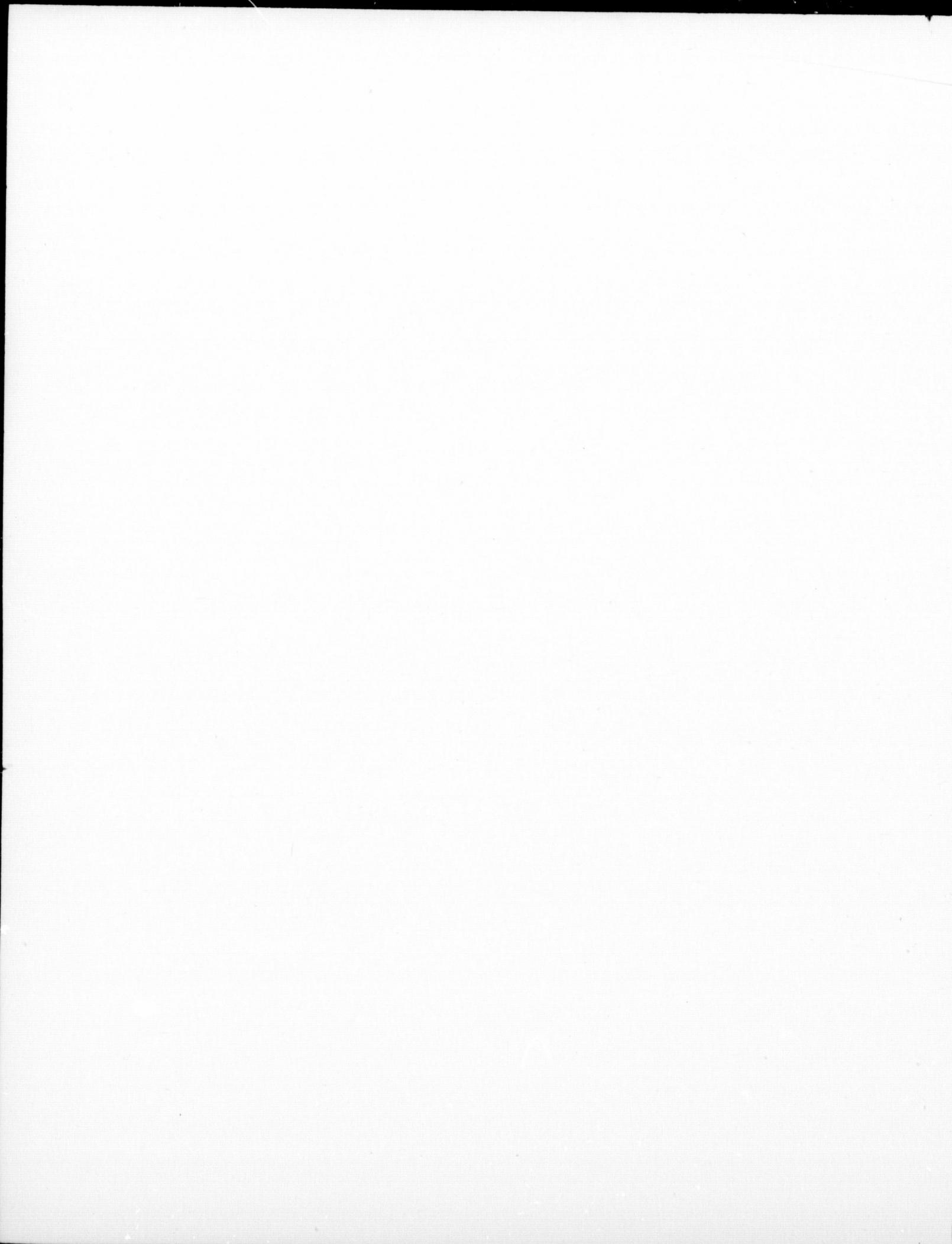
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truth of the factual allegations, which would make him deportable as charged. The Service did not rely upon any statement taken or any evidence seized at the time of his arrest to establish deportability. Thus, even if the arrest were illegal, this would not invalidate the subsequent deportation proceedings, La Franca v. INS, *supra*; Shing Hang Tsui v. INS, 389 F.2d 994 (7 Cir. 1968); Miller v. Quatsoe, 332 F. Supp. 1269 (E.D. Wisc. 1971). See also Huerta-Cabrera v. INS, 466 F.2d 759 (7 Cir. 1972). We are satisfied that the immigration judge properly denied the respondent's motion to suppress. The finding of deportability is supported in the record by evidence which is clear, convincing and unequivocal. Voluntary departure is the only discretionary relief for which the respondent is eligible and he was afforded this relief. Since execution of the immigration judge's order has been stayed during the pendency of this appeal, we will provide for voluntary departure for the respondent in accordance with the time fixed in that order.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Acting Chairman



COPY RECEIVED
Paul J. Curran
UNITED STATES ATTORNEY

4/10/75

J. T. C.